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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-188

ROBERT I. CLAUSEN, H. B. SURKAMP and HADLEY P. STONNER,
Petitioners,

vs.

THE NORTHERN TRUST COMPANY, as Trustee,
Respondent.

REPLY BRIEF OF PETITIONERS

J. WARD DRISCOLL
25 South Bemiston Avenue
Clayton, Missouri 63105
Attorney for Petitioners

St. Louis Law Printing Co., Inc., 411-15 N. Eighth St. 63101 314-231-4477

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The last paragraph on p. 2 and the third paragraph on p. 3 of the Brief for Respondent in Opposition seem intended to convey the impression that the order of the Court of Appeals for the Eighth Circuit in dismissing petitioners' appeal for lack of jurisdiction was related to petitioners' filing amended pleadings in the District Court, as described on pp. 13-16 of the Petition for Writ of Certiorari.

Respondent first filed in the Court of Appeals a Motion to Dismiss petitioners' appeal for lack of jurisdiction. Respondent later filed in the Court of Appeals a Motion to Affirm, which is included hereafter in Additional Appendix, and in said Motion to Affirm respondent argued that "the questions presented to review are so insubstantial as not to need further argument" and that "as a result of the filing of appellants' Answer and Counterclaim in Cause No. 71 C 76 (3) the arguments asserted by appellants in their Motion to Stay all Proceedings are now moot."

The Court of Appeals denied respondent's Motion to Affirm, at the same time it was granting respondent's Motion to Dismiss for lack of jurisdiction. As mentioned in the last paragraph of its memorandum in opposition to the Motion to Dismiss, p. A-46, petitioners noted the receiving of the Motion to Affirm and noted that they would file a separate response to it; however, the Court of Appeals proceeded to deny said Motion to Affirm, prior to petitioners filing their memorandum in opposition to said Motion to Affirm.

As can be seen in pp. 13-16 of the Petition for Writ of Certiorari, the petitioners have consistently sought to have the proceedings in the federal court stayed, pending the final adjudication of the matter of state law in the state court, and petitioners have appealed to the Court of Appeals to stay the proceedings in the District Court, upon the District Court's refusing to do so, and, when the Court of Appeals dismissed the appeal for lack of jurisdiction, petitioners filed their Petition for Writ of Certiorari with this Court to review that dismissal. The issue before the District Court is not moot, for as petitioners have stated both in their Motion for Rehearing of their Motion to Stay Proceedings and in their Motion to Stay While Appeal is Pending: "The situation of both the federal and state courts proceeding on the subject is not in

the interest of justice and it has serious adverse effects on federal-state relations and is a violation of defendants' (petitioners') rights to due process of law, as guaranteed to them by the Fifth Amendment to the U. S. Constitution."

In their Petition for Writ of Certiorari, petitioners state that the order of the Court of Appeals for the Eighth Circuit in dismissing their appeal for lack of jurisdiction is in conflict with at least the Second, Fifth and Tenth Circuit Courts of Appeals and with the Supreme Court. Respondent's brief offers no cases or arguments in opposition thereto, but merely cites the case of County of Allegheny v. Frank Mashuda Company, 360 U.S. 185, 3 L.Ed.2d 1163, 79 S.Ct. 1060 (1959), which is not on the subject of the jurisdiction of the Court of Appeals on such an appeal, but is offered by respondent to show that "the order of the District Court in refusing to stay the proceeding before it was clearly correct", p. 3 of respondent's brief.

The Allegheny case does not contain the elements in this case, for instance, there is no action by the plaintiff in the Allegheny case comparable to the action of the plaintiff (respondent) in this case, whereby it might be argued, as petitioners have argued herein, that respondent by its actions subsequent to its filing of the federal suit, has, analogous to the England v. Louisiana State Board of Medical Examiners, supra, case, "abandoned" its claim to having the federal District Court determine the matter of state law or respondent has neutralized its claim to federal jurisdiction based on diversity, and, under the circumstances, the District Court must abstain in the public interest to avoid needless friction with the state courts, and, failing to abstain on that basis, the District Court must abstain on the ground that further proceedings would be in violation of petitioners' due process

rights under the Fifth Amendment to the U. S. Constitution.

The Allegheny case must also be read in light of this Court's later decision in England v. Louisiana State Board of Medical Examiners, supra, in which this Court gave great care to the defining and observing of the proper roles of the state and federal courts. Petitioners believe their position, as regards the respective roles of the federal and state courts, is fully in accord with the England decision.

Respectfully submitted

J. WARD DRISCOLL
25 South Bemiston Avenue
Clayton, Missouri 63105
Attorney for Petitioners